

BJORK ♦ LINDLEY ♦ LITTLE ♦ PC

LAWYERS

PETER A. BJORK[†]
LAURA LINDLEY
DAVID R. LITTLE
KURT M. PETERSEN
ROBERT C. MATHES^{†*}
DARIN B. SCHEER[†]
KATHLEEN S. CORR
JILL D. CANTWAY
CHRISTOPHER G. HAYES^{*}
ANN M. EASTBURN[†]

*Of Counsel
*Special Counsel
†Also admitted in Wyoming
*Also admitted in the District of Columbia

February 6, 2006

Via electronic mail

NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Re: NEPA Draft Report Comments

Dear Representative McMorris:

I am an attorney in private practice in Denver, Colorado, focusing on oil and gas and public lands issues. Because my clients often seek to develop oil and gas resources on federal lands, I devote much of my practice to assisting clients with the NEPA processes associated with agency land use plan development, oil and gas leasing, and oil and gas permitting.

Based on my experiences with the NEPA process, I support the Committee's decision to examine NEPA's implementation and effectiveness in order to determine how to update and improve the statute. As the Task Force observed, NEPA serves an important role in agency decisionmaking by requiring both agencies and the public to consider the environmental impacts of government actions. Yet in addition to correctly describing NEPA's goals, the Task Force also accurately assessed how the statute has been implemented. The Task Force pinpointed how litigation has affected the NEPA process by leading to delays and increased costs of compliance. Additionally, the Task Force recognized that agencies are producing voluminous, technical documents in efforts to comply with the statute. Therefore, I encourage the Committee to recommend revising NEPA to create a more efficient process that continues to foster informed agency decisionmaking.

I. Addressing Delays in the Process

The Task Force recognized that extensive delays in the NEPA process plague the statute's operation. Moreover, the Task Force correctly identified the causes of the delays, which include the large number of agency decisions that are subject to the NEPA process, the increasing length and complexity of NEPA documents, and the lack of milestones in the NEPA process. The Task Force's Recommendations are laudable because they attempt to address these sources of NEPA delays, but they require more explanation before they can be implemented.

A. Recommendation 1.1: Amend NEPA to Define "Major Federal Action"

In Recommendation 1.1, the Task Force suggests amending NEPA to define "major federal action" as "new and continuing projects that would require substantial planning, time, resources, or expenditures." Currently, the CEQ regulations do not attribute a definition to "major federal action" that is independent of the term "significantly." *See* 40 C.F.R. § 1508.18. By giving meaning to the term "major federal action," the Task Force appropriately attempts to capture NEPA's original requirement that agencies prepare EISs for federal actions that both are "major" and "significantly affect the human environment." *See* 42 U.S.C. § 4332(2)(C). The Task Force should define "major" to focus on the agency action at issue rather than the action's impact, because such a definition will narrow the types of actions subject to NEPA analysis and therefore reduce the number of EISs that agencies are required to prepare.

The definition that the Task Force suggests, however, may pose two problems. First, the definition does not indicate whether a project that requires substantial planning, time, resources, or expenditures from a private actor, but not the government, falls within the definition of a "major federal action." For example, the definition does not indicate whether the issuance of a government permit that requires minimal government action but authorizes a substantial private project would constitute a "major federal action." The Task Force must clarify that its definition of "major federal action" would not apply to government authorization of private actions. Additionally, the Task Force must ensure that the definition does not expand the types of private actions currently subject to NEPA analysis and therefore require agencies to produce more EISs.

Second, the Task Force's definition of "major federal action" is flawed because it encompasses projects that only require significant expenditures. A project that does not require substantial planning, time, or resources, but only is expensive, such as the purchase of a piece of large equipment, should not automatically be considered a "major federal action" because it is not necessarily a significant federal undertaking. Moreover, the term "expenditures" is unnecessary because the term "resources" appears to include expenditures. Therefore, the

definition of “major federal action” should be modified to “new and continuing projects that would require substantial planning, time, or resources of the agency.”

B. Recommendation 1.2: Amend NEPA to Add Mandatory Timelines for the Completion of NEPA Documents

Recommendation 1.2 suggests amending NEPA to require that agencies complete EISs in 18 months and EAs in 9 months. Generally, any effort to create more certainty in the NEPA process is commendable. An amendment to NEPA that directs agencies to complete EISs and EAs within specified time periods would pressure agencies to expedite the NEPA process. Additionally, amendments to NEPA that reduce the volume of analysis in EISs and EAs would complement a timeline requirement and allow agencies to meet statutory deadlines more easily. Such amendments include page limits on NEPA documents, as suggested in Recommendation 2.2, and requirements that encourage agencies to tier analysis in new EISs and EAs to existing NEPA documents.

Although the deadlines suggested in Recommendation 1.2 may reduce NEPA delays, the method that the Task Force proposes to enforce these deadlines may be problematic. The Recommendation states that analyses not concluded within defined timeframes would be considered “complete.” The Task Force does not explain, though, whether analysis in NEPA documents not concluded but deemed “complete” will also be considered “complete” as a matter of law if the document is challenged in court. If “complete” analysis cannot withstand a legal challenge to its sufficiency, a private applicant for a federal permit, lease, or right-of-way could be penalized for an agency’s inability to meet the statutory deadline. Accordingly, the Task Force should explore ways to enforce statutory deadlines that would not injure the interests of private applicants.

C. Recommendation 1.3: Amend NEPA to Create Unambiguous Criteria for the Use of CEs, EAs, and EISs

Recommendation 1.3 proposes to incorporate into NEPA “unambiguous criteria” for the use of categorical exclusions (CEs), environmental assessments (EAs), and environmental impact statements (EISs). Clearer criteria as to when agencies should use EAs, EISs, and CEs are beneficial because they will reduce inconsistent application of these definitions and provide courts with more guidance to evaluate agency actions. The Task Force does not, however, indicate what criteria it might adopt to distinguish between EAs and EISs.

The Recommendation suggests requiring use of CEs for “temporary activities or other activities where the environmental impacts are clearly minimal” unless agencies have “compelling evidence to utilize another process.” These criteria would assist agencies by

allowing them to more easily defend CEs because challengers must establish with “compelling evidence” that the activities at issue require EAs or EISs.

D. Recommendation 1.4: Amend NEPA to Address Supplemental NEPA Documents

Recommendation 1.4 proposes to amend NEPA to codify the criteria for the use of supplemental NEPA documentation in 40 C.F.R. § 1502.9(c)(i)-(ii). Such an amendment would be advantageous because it would reinforce that agencies must only supplement NEPA documents, and that courts can only require supplementation, when “substantial” changes to the proposed action have occurred or when “significant” new circumstances or information develop.

II. Enhancing Public Participation

The Task Force accurately identified the importance of public participation in the NEPA process. One of NEPA’s strengths is that it allows both citizens who are affected by government actions, as well as stakeholders in the actions, to express any concerns or support. NEPA therefore ensures that government agencies receive a spectrum of viewpoints and input before adopting specific actions or course of action.

A. Recommendation 2.1: Direct CEQ to Prepare Regulations Giving Weight to Localized Comments

Recommendation 2.1 proposes to direct CEQ to promulgate regulations giving weight to localized comments. Although the input of local interests contributes to agency decisionmaking, this particular Recommendation is unnecessary. No reason exists for agencies to weigh comments from local individuals or entities, or any other specific group, more heavily than comments from others. Rather, local interests have mechanisms that enable them to be heard in the NEPA process, including the ability of local governments both to act as lead agencies alongside federal agencies, 40 C.F.R. § 1501.5(b), and to request cooperating agency status, 40 C.F.R. § 1508.5. By giving special weight to localized comments, the Task Force would discount the input of other interests and exclude other stakeholders.

Additionally, a directive requiring agencies to more heavily weigh comments from local interests could be construed as reducing agencies’ discretion to assess impacts or decide which action to take. For example, this Recommendation could require an agency to defer to local interests’ choice of scientific models or studies for the NEPA analysis. Similarly, this Recommendation could be construed as requiring agencies to defer to local comments regarding which preferred alternative the agency should adopt. This result may alter NEPA’s role from a procedural statute to one that requires substantive outcomes.

B. Recommendation 2.2: Amend NEPA to Codify the EIS Page Limits Set Forth in 40 C.F.R. § 1502.7

Recommendation 2.2 suggests amending NEPA to codify the CEQ guideline that EISs should normally be shorter than 150 pages and less than 300 pages for complex documents. *See* 40 C.F.R. § 1502.7. By adopting this Recommendation, the Task Force would make clear to courts and agencies that EAs and EISs are not intended to be exhaustive documents. Additionally, incorporating the page limit guidelines into NEPA would reinforce the different depths of analysis required in EAs and EISs. This Recommendation will be most effective if adopted with other provisions that encourage agencies to reduce the volume of analysis in NEPA documents, such as requiring agencies to tier new EAs and EISs to analysis in existing documents when possible.

III. Better Involvement for State, Local, and Tribal Stakeholders

Recommendation 3.1 proposes to amend NEPA to grant “tribal, state, and local stakeholders” cooperating agency status if so requested. The Recommendation does not define the term “local stakeholders,” but it suggests that local individuals or groups with interests in the project would be afforded cooperating agency status. Such a definition is overly broad and could result in the designation of individuals or groups with no jurisdiction by law as cooperating agencies. Currently, NEPA’s notice and comment process affords citizens and interest groups an adequate opportunity to participate in the NEPA process. Instead, cooperative agency status should only be afforded to legally recognized entities that hold some jurisdiction by law. Therefore, if the Task Force chooses to recommend that agencies be required to grant cooperating agency status to tribal, state, and local stakeholders who request such designation, the Task Force must limit “local stakeholders” to those entities with some jurisdiction by law, such as local governments or agencies.

IV. Addressing Litigation Issues

The Task Force correctly identified the role litigation has played in shaping the NEPA process. As the Task Force explained, the threat of litigation or agency appeals has forced agencies to create NEPA documents that will withstand an array of challenges. These attempts to insulate analysis from potential challenges result in delays in the process and cumbersome, technical documents that do not provide the public with easily understandable information about a project’s impacts.

Notably, the Task Force asserts that only a small percentage of EISs are litigated in federal courts. Though true, this statement is misleading. When agencies house boards to hear administrative appeals, such as the Interior Board of Land Appeals (IBLA), often a greater number of NEPA appeals are brought before the boards than are filed in federal court. In these

proceedings, which can adopt an adversarial nature similar to litigation, the administrative boards may set aside agencies' initial NEPA decisions. Moreover, IBLA appeals, for example, often require roughly two years to resolve. Therefore, although the Task Force may not consider these appeals "litigation" because they are part of the agency's internal decisionmaking process, these proceedings also can delay NEPA processes and result in agencies' initial NEPA decisions being set aside and remanded for additional analysis. Accordingly, the Task Force should consider the volume of administrative appeals, as well as federal court litigation, when estimating the amount of NEPA litigation.

A. Recommendation 4.1: Amend NEPA to Create a Citizen Suit Provision

Recommendation 4.1 proposes to amend NEPA to include a citizen suit provision. Such a provision will curb the amount of NEPA litigation by establishing criteria that potential plaintiffs must meet before they may bring lawsuits challenging agency actions. Currently, NEPA does not provide a private right of action, and plaintiffs must bring challenges under the general judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706. Because the APA allows courts to review agency actions only when statutes lack specific citizen suit provisions, the APA's general review provisions permit an array of challenges under NEPA and do not adequately address issues that are specific to the statute.

1. Provide Standing Requirements

The Task Force proposes that a citizen suit provision establish "clear guidelines" on who has standing to bring challenges under NEPA and sets forth objectives that the guidelines would attempt to accomplish. Specifically, the Recommendation explains that standing guidelines should consider factors such as "the challenger's relationship to the proposed federal action," "the extent to which the challenger is directly impacted by the action," and "whether the challenger was engaged in the NEPA process prior to filing the challenge." It is important that any NEPA citizen suit provision narrow the universe of potential challenges to agency decisions by affording standing only to individuals or entities with a direct interest in the NEPA decisions and who have been involved with the entire NEPA process.

First, a citizen suit provision should clarify that potential plaintiffs must be involved throughout the NEPA public participation process to have standing in subsequent litigation. Similarly, a citizen suit provision should limit the issues that can be raised in litigation to those raised in the NEPA participation process, unless the issues arose after the public participation period closed. This requirement would require potential plaintiffs to notify agencies of defects in NEPA documents so that they may be cured before agencies reach their final decisions.

Second, because of decisions of the Ninth Circuit Court of Appeals, it is especially important that any citizen suit provision allow entities having an economic interest in a proposed

action to participate in litigation related to that proposal. In the Ninth Circuit States, which include California, Nevada, Arizona, Montana, Idaho, Alaska, Washington, Oregon, and Hawaii, an individual or entity that has only an economic interest in an agency decision does not have standing under NEPA. *See Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989).

As a result of this narrow definition of standing under NEPA, the interests of the oil and gas industry may not be represented in litigation in these states challenging agency decisions based on EAs or EISs. Moreover, as a general matter, the current law does not ensure representation of all viewpoints and interests in NEPA litigation. A citizen suit provision in NEPA can cure this disparity by defining standing to ensure that proponents of federal actions can initiate and intervene in NEPA litigation. Therefore, the Task Force should incorporate language into a citizen suit provision that permits proponents of federal actions and other persons having an economic interest in a proposal to participate in litigation challenging the action.

2. Establish Reasonable Time Period for Filing NEPA Challenges

The Task Force suggests limiting the time period during which plaintiffs may challenge NEPA decisions in court to 180 days after the final agency decision. This change is necessary because the current six-year statute of limitations does not encourage plaintiffs to bring timely NEPA challenges. Because NEPA does not contain a statute of limitations, plaintiffs are limited by the general six-year time period to bring federal civil actions. *See* 28 U.S.C. § 2401(a). The expiration of this time period is too removed from the original agency decision. Such a long time period prevents a sense of finality of agency decisions and discourages applicants for federal actions from relying on agency decisions. Therefore, the 180-day period suggested by the Task Force is a dramatic improvement over the current requirement.

3. Impose Standard of Best Available Science

The Task Force proposes to require that challengers to analysis in NEPA documents establish that evaluations were not conducted using the “best available information and science.” This Recommendation imposes a more stringent standard for challenges to agency decisions than the default “arbitrary and capricious” standard that plaintiffs currently must meet to overturn agency decisions. As a result, this standard would relieve agencies from defending decisions to rely a specific body of scientific analysis over multiple others. Moreover, this standard would ensure that agencies retain discretion to select the scientific data or models they determine are best suited for the necessary analyses.

4. Limit Agencies' Ability to Enter Into NEPA Settlements

Finally, the Task Force suggests incorporating into a citizen suit provision a clause that prohibits agencies from entering into settlement agreements that severely limit activities for businesses that were not part of the initial lawsuit. This Recommendation is necessary to ensure that when agencies defend lawsuits in which plaintiffs alleged NEPA violations, the agencies do not agree to take actions, or refrain from taking actions, to the detriment of private entities without consulting with these entities. This Recommendation would guarantee that private businesses that would be affected by a settlement have an opportunity to participate in settlement discussions. As a result, the Recommendation would ensure that final agreements would not injure the interests of private businesses without consultation and consent.

B. Recommendation 4.2: Amend NEPA to Add a Requirement that Agencies "Pre-clear" Projects

Recommendation 4.2 suggests amending NEPA to require CEQ to "pre-clear" agency projects and to monitor court decisions. The "pre-clear" provision of this Recommendation, which appears to require agencies to submit projects to CEQ for evaluation before their commencement, is unnecessary. This Recommendation would result in an additional procedural step with which agencies must comply to complete the review process and lead to more delays.

The provision of the Recommendation that would require CEQ to monitor court decisions and advise agencies of their applicability, however, would prove beneficial. Uniform advice interpreting recent court decisions would prevent inconsistent application of case law between agencies. Moreover, utilizing CEQ as a clearinghouse for monitoring court decisions would allow CEQ to reconcile court decisions with its own view of the NEPA process and advise agencies accordingly.

V. Alternatives Analysis

The Task Force accurately identified the alternatives analysis in NEPA documents as contributing to delays in the overall process. Most of the problems with alternatives analysis, however, arise from the fact that neither the courts nor the CEQ regulations clearly delineate the scope of alternatives that agencies must consider. Therefore, defining the scope of the alternatives that agencies must consider would reduce both unnecessary analysis and delays in the NEPA process.

A. *Recommendation 5.1: Amend NEPA to Limit “Reasonable Alternatives” to Those that Are Economically and Technically Feasible*

Recommendation 5.1 suggests amending NEPA to require agencies to only analyze alternatives to a proposed action that are economically and technically feasible. This Recommendation would streamline NEPA analysis by compelling agencies to focus on only those alternatives that actually can be implemented. Currently, agencies must analyze all “reasonable” alternatives to a proposed action. See 40 C.F.R. § 1502.14(a). Few sideboards exist that tailor the definition of “reasonable,” because courts have only eliminated “remote or speculative” alternatives from the scope of agencies’ analysis. See *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978). Thus, the Recommendation proposes to integrate into NEPA the CEQ’s guidance that “reasonable alternatives” only include those that are economically and technically feasible. See *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026 (1981).

Recommendation 5.1 also suggests amending NEPA to state that agencies need not consider alternatives unless they are supported by feasibility and engineering studies and are capable of being implemented after considering cost, existing technologies, and socioeconomic consequences. Any amendment that incorporates such a provision should make clear that an agency need not make such a showing every time it attempts to analyze an alternative. Rather, the amendment should establish that a challenger arguing that an agency failed to consider an appropriate alternative must demonstrate that the alternative meets these criteria before an agency must consider it.

B. *Recommendation 5.2: Amend NEPA to Clarify that the Alternative Analysis Must Consider the No-Action Alternative*

Recommendation 5.2 proposes to amend NEPA to require agencies to include in NEPA documents an extensive discussion of the environmental impact of not taking an action, or the “no action” alternative. The Task Force misstates the need for such analysis. The Task Force states that this Recommendation will be an improvement over the “current directive in 40 C.F.R. § 1502.14, which suggests that [the no-action] alternative merely be included in the list of alternatives.” In fact, the current regulations do not “suggest,” but rather mandate, that agencies “shall . . . include the alternative of no-action.” See 40 C.F.R. § 1502.14. Therefore, the only change that the Recommendation suggests is that agencies devote more discussion to no-action alternatives. Although discussions of alternatives may lead to more informed decisionmaking, these discussions often reach a point of diminishing returns. By requiring that agencies produce additional alternatives analysis, this Recommendation undermines the Task Force’s stated objective of reducing NEPA delays.

C. Recommendation 5.3: Direct CEQ to Promulgate Regulations to Make Mitigation Proposals Mandatory

Recommendation 5.3 suggests directing CEQ to promulgate regulations that require that when agencies incorporate mitigation proposals into NEPA documents, agencies include binding commitments to proceed with the mitigation. Additionally, the Recommendation states that when private applicants are involved, agencies should incorporate mitigation proposals as legally enforceable conditions of the license or permit. This Recommendation is unnecessary. Federal agencies must ensure that mitigation efforts effectively limit the impacts of projects to the level anticipated in NEPA documents and therefore have an incentive to require mitigation when necessary. As a result, federal land management agencies currently incorporate mitigation requirements into federal leases, permits, and licenses as they deem appropriate. In some cases, however, agencies determine that they must alter mitigation procedures once a project is underway to mitigate impacts to the levels anticipated in the NEPA document. Therefore, a requirement that agencies consider mitigation proposals to be binding commitments is unnecessary and does not afford agencies and private actors the flexibility they require to revise mitigation measures when such measures prove harmful or ineffective.

VI. Better Federal Agency Coordination

Recommendation 6.1 proposes to amend NEPA to direct CEQ to promulgate regulations requiring agencies to formally consult with interested parties during the NEPA process. As the Task Force notes, communication between federal agencies, interested parties, and the public is vital to the NEPA process. Requiring agencies to formally consult with interested parties throughout the NEPA process, however, is not necessary to ensure adequate communication between parties and, moreover, could delay the process. The Task Force does not explain why the current NEPA structure does not allow for an adequate dialogue between stakeholders and agencies. In fact, requiring that agencies consult with parties in the midst of preparing NEPA documents could result in agencies not completing the documents in a reasonable period of time.

VII. Clarify Meaning of “Cumulative Impacts”

Recommendation 8.2 suggests directing CEQ to promulgate regulations clarifying that agencies’ cumulative impact analysis must assess the future impacts of concrete actions, rather than the impacts of “reasonably foreseeable” actions as currently required in 40 C.F.R. § 1508.7. This change would be consistent with some courts’ interpretation of the “reasonably foreseeable” language in 40 C.F.R. § 1508.7 as only requiring agencies to evaluate actions that have been proposed or for which steps toward proposal have been taken. *See, e.g., Utahns for Better Transp. v. United States DOT*, 305 F.3d 1152, 1173 (10th Cir. 2002). Because other courts have

not adopted this interpretation, this change would result in a more consistent judicial interpretation of the limits of cumulative impact analysis. Additionally, this change would focus agencies' cumulative impact analysis and not require them to evaluate the impacts of actions that will never occur.

The Task Force should make certain that any CEQ directives regarding cumulative impact analysis would not affect the BLM's ability to utilize "reasonably foreseeable development" scenarios (RFDs) when complying with NEPA. RFDs are reasonable estimates of future oil and gas development that are based on geologic and technologic information about the potential for and type of oil and gas activity. Although RFDs are not planning decisions, the BLM Handbook allows the agency to rely on them to assess the impacts of alternatives set forth in the agency's land use plans. *See* BLM Handbook H-1624-1, Planning for Fluid Mineral Resources, at Ch. III.B.4(a)(2) (1990); BLM Instruction Memorandum No. 2004-089, Attachment 1 (Jan. 16, 2004); *see generally* 43 C.F.R. § 1610.4-6 (2005). Because the BLM regards RFDs as an important tool when complying with NEPA, any rulemaking by the CEQ to focus agencies' cumulative impact analysis on concrete, proposed actions should not alter BLM's ability to utilize RFDs to assist with NEPA compliance.

In sum, I support the Task Force's efforts to evaluate and improve NEPA. Many of the Task Force's recommendations will lead to a more efficient NEPA process. Please do not hesitate to contact me about these comments.

Sincerely,

BJORK LINDLEY LITTLE PC

A handwritten signature in black ink, appearing to read "Kathleen S. Corr". The signature is fluid and cursive, with the first name "Kathleen" and last name "Corr" being clearly legible.

Kathleen S. Corr